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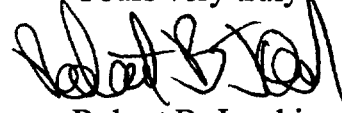
VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Dear Ms. Salas

Texas Television, Inc., through subsidiary licensees, owns and operates television stations KIII-TV, Corpus Christi, Texas and KBMT, Beaumont, Texas. On behalf of Texas Television, Inc., there are herewith transmitted an original and five copies of its Comments with respect to the SHVA proceeding.

Yours very truly



Robert B. Jacobi

RBJ:btc

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter of

Satellite Delivery of Network Signals
to Unserved Households for
Purposes of the Satellite Home
Viewer Act

Part 73 Definition and Measurement
of Signals of Grade B Intensity

CS Docket No. 98-201
RM No. 9335
RM No. 9345

COMMENTS OF TEXAS TELEVISION, INC.

Texas Television, Inc., (hereinafter "Texas Television") through subsidiary licensees owns and operates television stations KIII-TV, Corpus Christi, and KBMT, Beaumont, Texas. Texas Television, Inc. respectfully submits its Comments in the above-referenced proceeding.

Station KIII-TV is licensed to Corpus Christi, Texas, the 127th market and is affiliated with ABC. Station KBMT is licensed to Beaumont, Texas, the 137th market and is also affiliated with ABC. Both stations are located in markets below the top 100, a fact which renders even more important the need to preserve network exclusivity. The rapid growth of the satellite television industry since 1995 has been extraordinary. The loss of network exclusivity within the recognized coverage area predictably will result in a decline in audience levels and a concomitant loss of revenue. Pragmatically, the loss of revenue will result in less available resources for the production of station-originated programming -- programming specifically directed to the local market. The carriage of distant network signals will not provide programming oriented to the local market place. The loss and/or

reduction of such programming, simply stated, is neither in the best interest of the local audience nor the local television station.

Moreover, the satellite industry has flagrantly abused the existing law. Station KBMT has received hundreds of calls and/or letters from subscribers within the station's Grade A contour requesting "waivers." Indeed, station KIII experienced a situation where the subscriber to whom the network package was offered resided between the station studio and the transmitter site -- approximately five miles from the station studio and seven miles from the transmitter site. What is abundantly clear from such selling practices is that satellite providers vend their product with full knowledge that the subscriber is not eligible for the network package and without informing the subscriber as to the rights of the local network stations.

Texas Television is sensitive to waiver requests from viewers who may not be able to receive the signal of its stations. Waiver requests have been granted where reception was not capable due to terrain factors, where the subscriber resided near the periphery of the Grade B contour or where the subscriber resided in an area which identified itself primarily with a different market. Nevertheless, the events giving rise to subscriber complaints as to the termination of network signals are rooted in the misleading sales practices and the misconduct of the satellite providers, not in the definition of the Grade B contour. In short, the problem is the misconduct of the satellite providers, not the definition of Grade B contour or what is an unserved household. The existing rules provide the methodology by which unserved households can be determined. Application of the existing rules combined with legitimate sales practices by satellite television vendors negate the need for new rules.

In addition to the above argument, it is Texas Television's position that the proposals of the Commission are beyond its statutory authority, would not solve the problem of simplifying the process by which unserved households are determined, and would introduce

confusion, complexity and the prospect of even more litigation that would harm consumers and the ability of local television stations to serve their communities as they are required to do under long-standing national communications policy. In support whereof, the following is shown:

I. THE FCC DOES NOT HAVE THE LEGAL AUTHORITY TO AMEND THE DEFINITION OF A GRADE B TELEVISION SIGNAL FOR PURPOSES OF DEFINING AN UNSERVED HOUSEHOLD UNDER THE SATELLITE HOME VIEWER ACT ("SHVA").

The Commission has tentatively concluded that it has the authority to change the definition of Grade B service for purposes of defining an unserved household under the SHVA. It has requested comment on this tentative conclusion.

Initially, Texas Television would note that the Commission is in this instance claiming the power to interpret a copyright statute, 17 U.S.C., Section 119, in a manner which would allow the FCC to amend the applicability of that law. Unlike the Communications Act of 1934, the Commission has no special expertise with respect to copyright law or policy and has no specific statutory responsibility to implement copyright policy or statutes. Thus, the Commission cannot claim any special deference to its interpretation of a statute which it has not been charged to implement. While an agency's interpretation of the provisions of its authorizing statute may reflect special insight with respect to the policies and goals Congress has attempted to achieve and the means by which that can best be accomplished, the Commission cannot claim such special expertise or insight in the instant case. Indeed, the provisions of the Copyright Act lead to the conclusion that Congress did not intend the definition of an unserved household to be subject to the vagaries of changing FCC definitions of what constitutes an unserved household.

Secondly, it is important for the FCC to recognize that the SHVA is as much, if not more, a vehicle for protecting copyrighted works from unauthorized secondary transmissions

as it is a scheme for restricting or allowing delivery of network television signals. The distinction is important to the attitude the Commission brings to the assessment of its power under the SHVA to change the definition of a Grade B signal.

Third, the fundamental premise of the SHVA is that the private right of contractual exclusivity that local stations acquire from networks is entitled to copyright protection by an objective specific standard. Congress has decreed that the standard, since it is based upon probability analysis, cannot be so rigid as not to allow for exceptions upon a proper showing by the satellite provider. The statute is, however, otherwise devoid of any indication that the Grade B standard, as a starting point, may change over time or place, modifying network/station exclusive agreements and opening to satellite providers core urban markets for the delivery of distant network signals rather than being confined to rural zones that lacked both a local station network signal and access to a cable television system.

The Commission relies, nonetheless, on two technical arguments to support its tentative conclusion of authority to amend the Grade B definition for SHVA purposes. First, they point to the language in Section 119(f) of the definition of unserved household and the parenthetical phrase that the Grade B definition shall be "as defined by the Federal Communications Commission." At best, the reference to the FCC's definition of a Grade B signal is ambiguous and not a clear directive of new authority to the Commission to rewrite copyright policy and implementation. The statute does not say that the Grade B definition will be "as the Commission will hereafter define it," which would give clear authority to the Commission to establish a new definition after the date of enactment of the statute, in this case 1988. In fact, the reference to the FCC is in the past tense, which implies no power to alter for the future and only for SHVA purposes a long-standing definition of the FCC, adopted in 1952 and unchanged since then.

The Commission also infers the power to change the definition for purposes of SHVA application from the fact that Congress has referred with particularity to FCC rules in place at a specific date in Section 111 of the Copyright Act. The alleged absence of such specific reference in Section 119 is deemed by the Commission as granting a power to amend the Grade B definition because it was not fixed as precisely in Section 119(f) as it has been in other Congressional statutes. This line of argument erroneously assumes that Congress has not specifically referenced a rule of the Commission defining Grade B service when, in fact, the reference was as specific as was needed to carry out the Congressional purpose of delimiting precisely where satellite video providers could provide distant network signals under a compulsory license.^{1/}

Not only is there nothing in the precise language of the statute which grants the Commission power to set copyright policy, the legislative history contains nothing supporting the Commission's presumed authority and, to the contrary, makes plain that it is Congress alone that intends to supervise, control and write copyright policy with respect to

^{1/} It is interesting to note that the House Report on the initial 1988 bill that became the Satellite Home Viewing Act, P.L. 100-667, defined the term "unserved household" as meaning a household that could not "receive, through use of a conventional outdoor antenna, a signal of Grade B intensity (as defined by the FCC, currently in 47 CFR, Section 73.683(a)) of a primary network station affiliated with that network." The underlying phrase was removed from the ultimate bill which left the Grade B signal definition merely to be referenced by the definition of the FCC, without specific rule reference. The removal of the reference to 47 CFR, Section 73.683(a) was more likely only intended to remove an unneeded redundancy than to subtly imply a delegated power in the FCC to change the definition in the future for the purposes of SHVA. Indeed, the reference to "currently" only recognized that the Commission has over the years changed the rule number within which a Grade B signal was defined. The substantive standard of what constitutes a Grade B service has not changed at all, even though the rule number in which it has been embodied has. Thus the most natural reading of the removal of the reference to the specific rule number was that Congress intended only to adopt the substantive standard of what constituted a Grade B signal as the tangible and objective evidence of an unserved household, rather than to convey to the Commission a power to change that standard for the future implementation of the copyright statute.

the distribution of television programming by satellite carriers. In the first part of the House Report to P.L. 100-667, House Report number 100-887(I) (U.S. Code Congressional and Administrative News, p. 5611-5655 (1998)), the House Committee established that “the purpose of the proposed legislation is to create an interim statutory license in the Copyright Act for satellite carriers to retransmit television broadcast signals of super stations and network stations to earth station owners for private home viewing.”

The report goes on to state that “despite the inherent flexibility of the Copyright Act, technology has inevitably developed faster than the law in many instances, and in several circumstances Congress has amended the Act to keep pace with these changes.” (emphasis supplied)

The report continues:

When the Copyright Act of 1976 was enacted, “. . . the use of space satellites to transmit programming embodying copyrighted works was in its infancy.” [footnote omitted] Very little attention was paid to copyright issues posed by satellite transmissions directly to individuals for private home viewing. During the intervening years, the ability of the Act to resolve issues pertaining to the application of direct satellite transmissions to dish owners has not been tested to a great extent. As has been the case for other new technologies, it is appropriate for Congress to intercede and delineate this Nation’s intellectual property laws. (emphasis added) p. 5612.

The report then goes on to state as to the constitutionality of the legislation:

The proposed implementing legislation is clearly within Congress’ power to modify, amend or expand this Country’s intellectual property laws. (emphasis added) p. 5612.

The report goes on to note:

The framers of the Constitution assigned to Congress, the most politically representative of the three branches of the federal government, the role establishing intellectual property laws in exchange for public access to creations. In this context, the founding fathers contemplated a political balancing of interest between the public interest and proprietary rights. Congress struck that balance when it established the first patent and

copyright laws. As this country is developed and as new technologies have entered the scene, Congress has adjusted this Nation's intellectual property laws to incorporate new subject matter and to redefine the balance between public and proprietary interests. The Satellite Home Viewers Copyright Act of 1988 is a continuation of that process. (emphasis added) p. 5613.

The report goes on to note that:

The Committee concluded that legislation was necessary in order to meet the concerns about the home earth station owners and the satellite carriers and to force to be efficient, widespread delivery of programming via satellite. The bill balances the right to copyright owners by insuring payment for the use of their property rights, with the rights of satellite dish owners, by assuring availability at reasonable rates of retransmitted television signals. The bill preserves and promotes competition in the electronic marketplace. [footnote omitted] Moreover, the bill respects the network affiliate relationship and promotes localism. Further the bill takes affirmative steps to treat similarly the measure of copyright protection accorded to television programming distributed by national television networks and non-network programming distributed by independent television stations. In short, the bill meets the public interest test for intellectual property legislation. p. 5717-18.

The House Report not only emphasized the primary, exclusive role of Congress in establishing copyright policy for retransmission of distant network signals, but established a legislative framework that was intended to be temporary and to be replaced ultimately by marketplace forces and a competitive environment. Thus, the House Report stated:

The bill creates a statutory licensing system during a four-year period (phase one) with copyright royalty rates established at a flat fee of 12 cents a month per subscriber for each received super station signal and three cents a month per subscriber for each received network signal. During a second two-year period (phase two) , rates are set by negotiation and binding arbitration. After six years the entire legislative package is terminated by a 'sunset' provision. The bill rests on the assumption that Congress should impose a compulsory license only when the marketplace cannot suffice. [footnote omitted] p. 5618.

A reading of the House Report makes plain that Congress was not setting broad policy to be implemented by an administrative agency with power to change the standards adopted by Congress. Rather, the legislation was an effort on a temporary basis^{2/} to "fine tune," House Report, p. 5618, the relevant interests and satisfy them in a political context that was Congress' responsibility. All of this is simply inconsistent with the notion that the Federal Communications Commission has power to redefine the basic bright line test that Congress established for transitional legislation to determine where satellite carriers could distribute distant network signals under a compulsory license and where such distribution was barred absent agreement with the copyright holders.

II. AS A MATTER OF SOUND ADMINISTRATIVE DISCRETION AND DEFERENCE TO CONGRESS' AUTHORITY TO ESTABLISH TELECOMMUNICATIONS COPYRIGHT POLICY, THE COMMISSION SHOULD ABJURE FROM MAKING ANY CHANGE IN THE DEFINITION OF AN UNSERVED HOUSEHOLD WITHOUT SPECIFIC CONGRESSIONAL AUTHORITY.

Even if the Commission should determine that it has legal authority under the Satellite Home Viewer Act to redefine Grade B service for purposes of the copyright statute, it should not now engage in any such exercise. The SHVA expires at the end of 1999 and Congress must either extend the law or see it terminate. If it is extended, Congress will address the political, legal and technical issues that necessarily must be confronted. Given the wholesale refusal of the satellite industry to abide by the SHVA since it was initially enacted in 1988, as well as other public policy questions of competition and protection of local service that may be affected by copyright policy, there is no compelling reason for the Commission to step into this arena now to resolve an issue on a short-term basis that will likely create more problems than it resolves. Moreover, the Commission runs the risk of politically

^{2/} The SHVA, unless extended, sunsets on Dec. 31, 1999. See Section 4 of P.L. 103-369.

overextending itself if it effectively assumes the role of an independent adjudicator of SHVA claims when it is not necessary to do so and when Congress, as the appropriate body, shortly will reestablish copyright policy and make the political judgments as to the interests that will be protected or left to the marketplace for the future.

No relevant or compelling need has been shown to grant new rights to carry distant network signals inside the Grade B contour. Now threatened by injunctions and potential damages, carriers hope to overturn what Congress has established by relying on a cadre of dissatisfied satellite service consumers to put political pressure on Congress and the Commission in order to receive an illegal service that they should not have been fraudulently hoodwinked into receiving in the first place. The case for revision of the Grade B definition cannot rest upon the illicit behavior of the satellite carriers as a reason for the FCC to make changes in the law. That is Congress' responsibility and prerogative.

III. THE COMMISSION'S PROPOSED CHANGES IN THE DEFINITION OF A GRADE B SIGNAL AND RELATED PROPOSALS TO ESTABLISH THE CIRCUMSTANCES UNDER WHICH A NEWLY DEFINED GRADE B SIGNAL CAN OR CANNOT BE RECEIVED WOULD NOT ACHIEVE THE GOAL OF ASSURING UNSERVED HOUSEHOLDS ACCESS TO A DISTANT NETWORK OR LOCAL SIGNAL ANY MORE THAN THE CURRENT SYSTEM. ON THE CONTRARY, THE PROPOSED CHANGES WILL ACCELERATE THE EROSION OF AUDIENCE FOR LOCAL NETWORK AFFILIATED STATIONS AND THEIR ABILITY TO SERVE LOCAL NEEDS.

None of the FCC proposals (paragraphs 29-40 of the NPRM) is likely to make a substantial difference in the efficacy of the statutory scheme that now exists under the SHVA. Instead, the Commission would be marching down a clearly regulatory path, rather than a deregulatory road, that would complicate and confuse further the rights of the public, networks, local stations and satellite carriers as to their ability to comply with the requirements of the SHVA. Indeed, the more the Commission embarks upon implementing proposals that would focus upon the reception qualities of a Grade B signal rather than the

protected geographic market area within which network exclusivity contracts must be honored, the more it will encourage all parties to be engaged in complex factual dispute resolution that would be better served by a generalized bright line test of the Grade B definition that now exists in the statute. Even the current statutory provisions allowing for measurements are not without the potential for engaging the parties in complex and costly disputes to identify the quality of the signal at a particular point, but at least there now is a clear sense of what the law requires in this regard as a result of the litigation in Florida and North Carolina and the ability of the satellite and television industry to sit down and devise practical means of establishing Grade B service or not, rather than having to apply and interpret new measurement techniques. In this respect, the Commission needs to remember that Congress intended the SHVA to be a temporary measure only and, in time, it felt that the marketplace and competition would lead to the adoption of private arrangements for copyright reimbursement and licensing that would meet the needs of the marketplace without governmental intervention. There are any number of avenues open to achieve this end without further intrusion by the Commission in a reregulation of complex, technical and legal disputes. Further research and refinement of the satellite industry's ability to deliver local-to-local network signals, to market satellite dishes with special outdoor antenna's to receive local stations off the air (see attached Wall Street Journal story), and/or the adoption of

copyright reimbursement provisions by Congress, are other means of resolving the problems in a far better manner than a one-time, interim and unneeded intercession by the FCC.

Respectfully submitted,

TEXAS TELEVISION, INC.

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Date: December 11, 1998

Antennae Attract Viewers to Satellite TV

By LESLIE CAULEY
And FREDERIC M. BIDDLE

Staff Reporters of THE WALL STREET JOURNAL

Satellite-TV companies may have finally solved their local problem.

Potential customers for direct broadcast satellite TV, or DBS, were stopped cold for years by a big drawback: Satellite service offered hundreds of channels, but not local ones. To get local stations, satellite customers either had to install old-fashioned "rabbit ears" on their TVs or keep up their cable subscriptions.

But thanks to improvements in technology, and some help from big regional telephone companies, DBS operators are now in a position to offer local TV broadcasts. And now, the satellite-TV industry thinks it can finally become a more serious rival to cable.

DBS companies effectively have been shut out of the local-TV business by Congress. To keep satellite technology from steamrolling broadcast and cable companies, lawmakers decided that DBS companies in most places could transmit local TV signals—but only if they transmitted every one in the country. Given the thousands of local TV stations in the U.S., the decision made offering local broadcasts by satellite a practical and technical impossibility.

Now, DBS services, working with telephone companies, are simply adding a separate advanced antenna to their satellite package. They give customers the local channels they want—but not by satellite.

Earlier this year, two big DBS operators—Hughes Electronics Corp.'s DirecTV unit, based in El Segundo, Calif., and U.S. Satellite Broadcasting Co., St. Paul, Minn.—signed co-marketing deals with big regional phone companies, including Bell Atlantic Corp. and GTE Corp. The phone companies have started selling satellite TV as part of a package of phone, video and high-speed data services.

Armies of door-to-door sales representatives are singing DBS's praises and offering turnkey satellite services, including powerful new antennae capable of tapping local TV channels with the mere zap of a remote control. "All you do is sit in your easy chair, hit the button, and you're off to the races," says Richard Belville, president of Bell Atlantic's video unit.

The cable industry is fighting back with

new technology of its own. "Any cable system with an upgraded technical platform can be fully competitive with any DBS company," asserts Julian A. Brodsky, vice chairman of Comcast Corp., which is based in Philadelphia. Comcast has been aggressively upgrading its old cable plant to handle an array of digital services, including phone, high-speed data and interactive video.

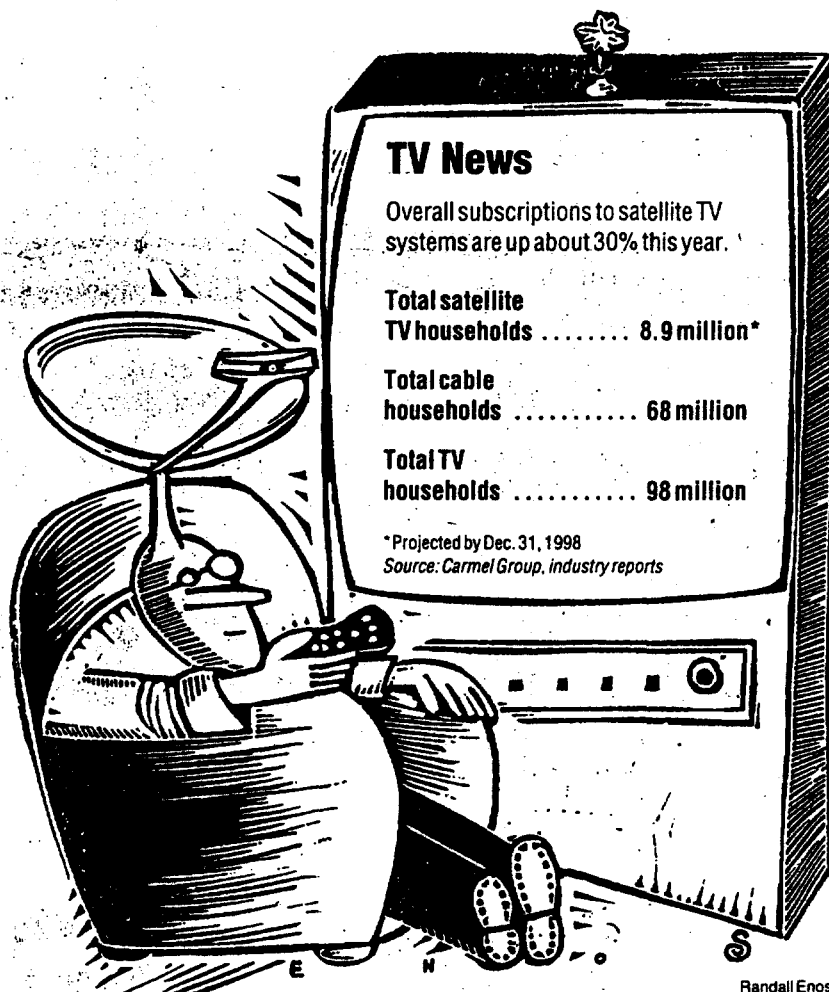
Gail Neumann, a retired bookkeeper in Hillsborough, N.J., dumped her longtime cable-TV company about a month ago after signing up with DirecTV through Bell At-

lantic. She has ordered the works for around \$55 a month—about what she used to pay for her old cable service—and says she hasn't looked back. "There are like a million things on," she says. "About the biggest decision I have is what to watch."

Mrs. Neumann says all the new channels give her more value for her money. Plus, she says, her TV reception, which had been hit-or-miss with cable, has improved substantially with satellite. "I'm crazy about it," she says.

Greg Lewis, a Falls Church, Va., auto-

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INDUSTRY FOCUS

Satellite Television Is Using Antennae to Fight Cable

Continued From Page B1

motive mechanic, is another convert. He signed up for DirecTV service about a month ago, after getting a good look at it while visiting his brother, who is a Bell Atlantic employee.

Mr. Lewis says local TV channels come in "just as good if not better" as they did before, and reception on other channels is a lot sharper. He is also paying about \$15 a month less than he did for cable. "That's the icing on the cake," he says.

The local antennae are entirely legal. Deborah Lathen, head of the Federal Communications Commission's cable bureau, says the new DBS offerings benefit the consumer and promote competition.

The satellite-TV industry is pushing the new local services thanks to improved antenna technology. Most of the stainless-steel antennae used by Bell Atlantic—shaped like arrows about half the length of a yardstick—are mounted on roofs or the

sides of chimneys. Sometimes Bell Atlantic can install them in attics.

Bell Atlantic's basic satellite package, priced at around \$35 a month, includes 85 TV channels, 31 music channels, 55 pay-per-view movie choices (movies cost an additional \$2.99 each) and an interactive on-screen movie guide. Bell charges \$199 to install one DBS system for one TV, including an over-the-air antenna and a dish.

Buoyed by early results, Bell Atlantic plans to introduce the service throughout its territory, which extends from Maine to Virginia and includes such cable strongholds as New York City, served by cable giant Time Warner Inc. DirecTV and Bell Atlantic are discussing offering services such as interactive TV, telephone and high-speed data by satellite in the future. "We think this is a product that definitely has a market," says Bell Atlantic's Mr. Belville.

Other DBS players also are starting aggressive marketing, offering deep discounts on equipment and installation and

operating 24-hour customer hot lines. EchoStar Communications Inc., Denver, recently began offering free gear and installation to customers who sign up for one year of its most expensive service, which costs \$50 a month.

So far, the push seems to be paying off. The four main DBS players—which also include PrimeStar Inc. of Denver—are expected to see their combined subscriber base jump this year by more than 30% to almost nine million households, with similar gains expected next year. (Figures don't include customers of old-fashioned big-dish satellite service, which is being phased out.) The growth spurt could push the three-year-old DBS business well past the 10-million-subscriber mark by 2000.

"The numbers speak for themselves," says Jimmy Schaeffler, chairman of the Carmel Group, an industry consultant. DBS, he says, "is the fastest-growing consumer-electronics product in history." He says research indicates that many con-

sumers who try satellite TV subsequently drop their cable hookups.

DBS operators think their advantage will only increase with the arrival of high-definition TV, which also is digital. DirecTV and U.S. Satellite Broadcasting have struck a deal to transmit Home Box Office in the new HDTV format starting next year. Local cable companies, by contrast, are adopting HDTV more slowly, with just a handful of cable-TV stations expected to be digital-ready by year end.

Most cable companies are betting it will take a few more years for the HDTV market to develop. Current high-definition televisions cost thousands of dollars, putting them beyond the reach of most price-sensitive consumers. Price is one reason programmers haven't been in a rush to put shows in that format. Still, most cable companies are pushing to offer upgraded digital services, which will eventually put them in a position to offer their own expanded packages of channels.